Balch Pontiac Buick, Inc. *and* United Food and Commercial Workers, Local No. 919, AFL-CIO. Case 39-CA-17 (formerly 1-CA-16516)

February 25, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 26, 1981, Administrative Law Judge Robert Cohn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Balch Pontiac Buick, Inc., Warehouse Point, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

MEMBER ZIMMERMAN, concurring in part, dissenting in part:

I join in my colleagues' adoption of the Administrative Law Judge's Decision, except as to the finding that Respondent violated Section 8(a)(3) by laying off eight of its salesmen. I agree with the Administrative Law Judge, and my colleagues in the majority, that the General Counsel made out a *prima facie* case that Respondent laid off eight of its salesmen for prohibited reasons. Contrary to my colleagues, however, I would find that Respondent met its burden under *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), of demonstrating that the layoffs would have occurred in the absence of the improper motivation.

As the Administrative Law Judge found, Respondent was in dire financial straits at the time of the layoffs, which it claims motivated the layoffs. To refute Respondent's uncontradicted evidence of economic decline, the Administrative Law Judge speculated about the reasons that Respondent had not previously laid off salesmen for economic reasons, and assumed that Respondent had previously suffered periods of economic decline during its 40 years in business. The Administrative Law Judge also relied on the small costs incurred by Respondent in keeping additional salesmen on the payroll, since they are paid only the minimum wage for weeks in which their commissions do not exceed the minimum.

Finally, the Administrative Law Judge relied on Respondent's rejecting the advice of its company representative to lay off salesmen in order of production and competency, rather than by seniority. In doing so, he rejected Respondent's proffered testimony that such criteria were infeasible for determining the salesmen to be laid off.

I find this rationale unconvincing, particularly in light of several facts in the record. First, the level of Respondent's economic distress was severe. Second, as of April 1979, Respondent employed 30 salesmen; by the time of the layoffs it had already reduced its sales force to 10 with no allegation that such reductions were motivated by anything but

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] The Administrative Law Judge concluded, and we agree, that Respondent violated Sec. 8(a)(3) and (1) of the Act by laying off eight salespeople in August 1979. In so finding, however, we do not rely on the Administrative Law Judge's comment regarding the financial condition of Respondent over a 40-year period.

The Administrative Law Judge indicated that Respondent's advisors made no suggestion or recommendation that salespeople be laid off and that they certainly did not recommend that 80 percent of the sales force be laid off. We note that one of Respondent's advisors, Chauncey Murray, testified that in or about April 1979, when Respondent employed approximately 20 salespeople, he suggested to Respondent that it should investigate its sales force to determine "who sold what" and reorganize and keep the better salespeople. There is no evidence, however, that Respondent's decision in August 1979 to lay off 80 percent of its salespeople, only hours after the representation election had been conducted and at a time when its entire sales force totaled only 10, was pursuant to Murray's April suggestion.

In fn. 16 of his Decision, the Administrative Law Judge indicated that under the Board's decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the finding of unlawful discrimination here would not have been affected even had Respondent established that its financial situation had required, contrary to past practice, the layoffs of *some* of its low-producing salespeople. Respondent contends that the Administrative Law Judge erred in failing to determine whether, in fact, any of the layoffs could have been attributed to the economic situation of the Company. Under the circumstances, we find it unnecessary to rely on the Administrative Law Judge's analysis of *Wright Line*. Following determination that union activity was a "motivating factor" in the layoffs as a whole, that as a group they were not for "cause" and violated Sec. 8(a)(3), the burden was on Respondent to demonstrate that particular individuals nonetheless would have been released solely for lawful reasons. Respondent failed to produce any such evidence.

[3] Member Jenkins would provide interest on the backpay awarded due to Respondent's unlawful layoffs in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

economic considerations. Third, numerous nonunit employees were also laid off as part of Respondent's retrenchment efforts.

In light of this uncontradicted evidence, I would find that Respondent established that it would have laid off the alleged discriminatees even in the absence of their having engaged in protected concerted activity. As such, I would dismiss the complaint allegations relating to the salesmen's layoffs.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discourage membership in United Food and Commercial Workers, Local No. 919, AFL-CIO, or any other labor organization, by unlawfully laying off any employees or discriminating against them in any other manner with respect to their hire or tenure of employment.

WE WILL NOT coercively interrogate employees concerning their union membership or activities.

WE WILL NOT threaten employees with closure of our automobile dealership, or with other reprisals, should they join or assist the above-named Union or select it as their collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act, as amended.

WE WILL, to the extent that we have not already done so, offer Gerald Allen, Jesse Ansel, Hannah Dresser, Thomas Druzdis, Donald Fitzgerald, Michael Kennedy, Lloyd Moraven, and Peter Peterson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, and WE WILL restore their seniority and other rights and privileges.

WE WILL pay the above-named individuals any backpay they may have lost as a consequence of our having unlawfully laid them off, plus interest.

BALCH PONTIAC BUICK, INC.

DECISION

STATEMENT OF THE CASE

ROBERT COHN, Administrative Law Judge: This proceeding, held pursuant to Section 10(b) of the National Labor Relations Act, as amended (herein called the Act), was heard at Hartford, Connecticut, on August 25-27, 1980, pursuant to due notice. This principal issue raised by the pleadings[1] is whether Balch Pontiac Buick, Inc. (herein called the Company or Respondent)[2] in laying off eight of its salesmen on August 15, 1979, violated Section 8(a)(3) and (1) of the Act. There are also several allegations of independent violations of Section 8(a)(1) of the Act which are denied by the Respondent.

Subsequent to the hearing, and within the time allowed, helpful, post-hearing briefs were filed by counsel for the General Counsel and by counsel for the Respondent, which have been duly considered.

Upon the entire record in the case, including my observation of the demeanor of the witnesses,[3] I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is alleged in the complaint, admitted in the answer, and I find that, at all times material, the Respondent has been engaged at Warehouse Point, Connecticut, in the operation of an automobile dealership. In an annual period, the Respondent, in the course and conduct of its business, causes large quantities of automobiles used by it in the sale of automobiles to be purchased and transported in interstate commerce from and through States of the United States other than the State of Connecticut, and annually sells automobiles and related products and services valued in excess of $500,000, and receives products valued in excess of $50,000, from points directly outside the State of Connecticut.

Based on the foregoing, I find that, at all times material, the Respondent is, and has been, an employer engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is alleged in the complaint, but denied by the Respondent, that the Charging Party[4] is a labor organization within the meaning of Section 2(5) of the Act. The Respondent's denial is apparently based on its contention that the local union is under a trusteeship of the International Union. However, this was not definitely establisned by the evidence, and, even assuming it to be the fact, such would not necessarily preclude a finding that the local satisfied the requirements of Section 2(5) of the Act. Thus, the evidence establishes that the local union exists for the purpose, in whole or in part, of dealing with employers on behalf of employees respecting wages, hours, and working conditions, and that it assists

[1] The original charge was filed August 29, 1979; the original complaint and notice of hearing issued October 19, 1979.

[2] At the hearing in this matter, it was brought out for the first time by the Respondent that there are, in fact, three corporations involved. However, it appears that the corporations were established for the purpose of dealing with separate automobile manufacturers, and that the three equal one for purposes of this proceeding.

[3] Cf. *Bishop and Malco, Inc., d/b/a Walker's*, 159 NLRB 1159, 1161 (1966).

[4] United Food and Commercial Workers, Local No. 919, AFL-CIO.

in adjusting employees grievances and negotiating collective-bargaining contracts.

Based on the foregoing, I find that at all times material, the Charging Party is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

As previously noted, the Respondent owns and operates an automobile delearship selling at retail new and used automobiles, both American-made and imports. It is a family-owned company, having been in business for many years prior to the events giving rise to the issues in this case. Its founder and owner is one, Joseph A. Balch, Sr., who, with his wife and sons, constitute the majority stockholders in the business. The sons, James Balch and J. D. Balch (referred to in the record as Jody) also participated in the management and day-to-day operations of the dealership. Indeed, approximately 5 years prior to the spring of 1979, Jody Balch took over the chief executive position of the dealership from his father, and directed its operations.

Joseph A. Balch, Sr. (herein referred to as Balch, Sr.), testified that the dealership, generally speaking, had been successful, but started to lose money around 1977. This was apparently thought to be due, at least in part, to the rather grandiose plan of Jody Balch who was, as noted, at the helm of the business at that time. Jody Balch had plans for the expansion of the business, which consisted, among other things, of building a new showroom, body shop, and increasing manifold the amount of inventory kept on hand by the Respondent. Unfortunately, this came at a time when there was not a commensurate increase in the amount of sales to warrant such expenditures, and the profitability of the dealership, accordingly, suffered.

In the spring of 1979, adding to the financial woes of the Respondent, described above, came a gasoline shortage in Connecticut which resulted in long lines of automobiles at the gasoline stations. This resulted rather quickly in the dropoff of the sales of large American-made automobiles (gas guzzlers) which, of course, further added to the financial problems of the Respondent, and which was, apparently, a major factor in causing the resignation of Jody Balch as chief executive officer of the Respondent in April 1979. His father, Balch, Sr., returned from retirement to resume control of the Respondent's operations. At that time, the Respondent employed approximately 30 salesmen; however, when Jody Balch left, approximately 10 of these salesmen left with him so that, in the late spring of 1979, the Respondent employed approximately 20 salesmen. It was at this time that some of the salesmen contacted the Charging Union for the purpose of assisting them in organizing a union among their number at the Respondent's operations.[5]

[5] The record is not all together clear as to which among the salesmen were the leaders of the union movement. However, Jesse Ansel testified without contradiction that he was one of the instigators of the Union.

On or about June 29, 1979, the Union filed a petition with the Board seeking to represent the salesmen as their collective-bargaining representative at the Respondent. An election was scheduled and held on August 15, 1979, which the Union won. However, it is alleged that, between such dates, several of the managers (supervisors) of the Respondent interrogated and threatened some of the salesmen respecting their union activities. We now turn to an examination of the evidence respecting such allegations.

B. *Alleged Interference, Restraint, and Coercion*

1. Harry Peterson

Peterson was a sales representative (salesman) for the Company, having been employed for approximately 1 year and 8 months prior to the summer of 1979. Approximately 2 weeks prior to the Board election on August 15, Peterson was in the office of Bob Keane, manager of the Respondent's finance and insurance office. Peterson testified that, while he was in Keane's office performing some paperwork on one of his sales, Keane mentioned that he hoped the Union would not be elected because he felt that Balch, Sr., would close the doors.

A few days before the election, Peterson was in the office of Ken Shover, manager of the new-car department. During a conversation with Shover, the latter appeared worried and said that he "hope[d] that the union doesn't get in because the doors will be locked here." At or about the same time, Peterson had a conversation with James Pinto, general manager of the Respondent, in the service department. According to Peterson's testimony, Pinto asked what the fellows were doing by trying to get a union in the facility, and Peterson replied that they were just trying to get what was rightfully theirs.

With respect to the asserted conversation between Peterson and Keane, above-related, I find, contrary to the contentions of the General Counsel, that no violation of Section 8(a)(1) of the Act occurred. Assuming the statement of Keane to Peterson to be as related by Peterson.[6] I consider the statement to to be a mere matter of opinion expressed by Keane of what might happen should the Union prevail in the Board election. As such, it is protected by Section 8(c) of the Act. Accordingly, I will recommend that the complaint, to that extent, be dismissed.

The situation is different with respect to the Peterson-Shover conversation since Shover did not express himself in terms of opinion, but rather indicated a certainty that the facility would be closed; i.e., the doors locked, if the Union prevailed.[7]

[6] Keane denied he had any conversation with Peterson concerning the Union.

[7] The foregoing findings are based on the testimony of Peterson who impressed me as an honest and candid witness, and whose testimony I credit over that of Shover. Although the record indicated that during the late spring and summer of 1979, there was substantial conversation about the Union among the salesmen and some of their supervisors, including Shover, both during and after working hours, Shover on cross-examination indicated no knowledge of the organizational drive and testified that he did not speak to anyone about the Union at all. I find this testimony to be rather incredible.

General Manager Pinto testified that he had a conversation with Peterson along about the time that Peterson asserted that Pinto interrogated him concerning union activities among the salesmen. However, Pinto's version of the conversation is somewhat different: "I said to him, Harry, what the hell's wrong? What can we do to straighten this out? He said I'll let you know." Whichever version one chooses to believe, I believe that a violation of Section 8(a)(1) of the Act resulted. I believe it to be a fair inference that both men were aware of the subject matter of the conversation; i.e., the Union; that Pinto was inquiring into the nature and extent of such activities, and what, if anything, management could do to avert the employees from their intended goals. This, without any legitimate purpose or assurances against recriminations.[8]

Based on all of the foregoing, I find that, on this occasion, Pinto coercively interrogated Peterson concerning the salesmen's union activities, and therefore violated Section 8(a)(1) of the Act.

2. Thomas Druzdis

About 2 weeks before the Board election, Druzdis, a salesman, had a conversation with James Balch, one of the sons of Balch, Sr., in the latter's office. During the conversation, Balch told Druzdis that if the Union were voted in, his father would close the business, and that he and his mother would move to Florida. Balch denied having the conversations with Druzdis. However, the latter impressed me as an honest and forthright witness whom I doubt would make up the asserted conversation out of the whole cloth. Moreover, the record shows that Balch, Sr., did, in fact, take his vacations in Florida, and presumably stayed there much of the time while Jody Balch was in charge of the firm. Accordingly, it would not seem unlikely that James Balch would assume that his father and mother might very well move there should adverse circumstances, such as having to deal with a union of his salesmen to which he was strongly opposed, come about.[9] Accordingly, I find the foregoing threat by James Balch to constitute a violation of Section 8(a)(1) of the Act.

3. Michael Kennedy

Kennedy, a salesman for the Respondent, testified that during the several weeks before the election, he had conversations concerning the Union with practically every manager of the Respondent. Kennedy testified that, in fact, James Balch was the first to inform him about the Union; that at closing time, 1 or 2 weeks before the election, Balch called Kennedy into his office and told him that he (Balch) wanted to make sure that Kennedy went to the union meeting that night. When the latter said he did not know anything about it, Balch responded, "Well, just find out what it's all about." About a week later, while they were walking down a hallway, James Balch told Kennedy that "If the salesmen voted in the Union, his father would shut the doors."

Kennedy testified that the had several conversations with General Manager Pinto, who told him on several occasions that Balch, Sr., would close the doors or that the salesmen would be "out of a job" if the Union were voted in.

Kennedy testified that, at or about this time, he had a conversation with Manager Shover in the latter's office; that Shover brought up subject matter of the Union and stated that, if the salesmen voted the Union in, they would be out of a job.

Kennedy also testified with respect to a conversation with Finance Manager Bob Keane; that the latter brought up the Union and said that the salesmen should be serious because, if they vote the Union in, Balch would lay everybody off and sell the cars himself. Finally, Kennedy had a conversation with his supervisor, Tino Miano, who was head of the import department, about 2 or 3 weeks before the election. Miano asked Kennedy what was going on with the Union, and said that, if the salesmen voted the Union in, they would be out of a job.

The credibility issue here has been a difficult one. Kennedy was not as impressive a witness as were Peterson and Druzdis. On the other hand, I do not believe that he fabricated the above conversations. At the same time, I am unable to fully credit the denials of the managers for several reasons. (1) they had an obvious interest in the outcome of the proceedings; (2) it is highly unlikely they were unaware of Balch, Sr.'s antipathy toward the unionization of the salesmen and passed this information on to the employees for what they considered their own good; and (3) the managers were probably fearful of losing their own jobs should Balch, in fact, close the dealership. Accordingly, on balance, I credit the testimony of Kennedy, and find that the interrogations and threats made by the several managers as set forth above, constituted interference, restraint, and coercion in violation of Section 8(a)(1) of the Act.

C. *The Alleged Discriminatory Layoffs*

On the afternoon of August 15, 1979, a few hours after the Board had conducted the representation election among the salesman (which the Union won), Balch, Sr., called all of the 10 salesmen together for a meeting and announced the layoff of 8 of them.[10]

Michael Kennedy testified that, at that meeting, Balch, Sr., stated that the reason for the layoff was that "he had lost $40,000 or something in the last month and that he could not afford to have us salesmen on the floor."

[8] See, e.g., *Bonnie Bourne, d/b/a Bourne Co.* v. *N.L.R.B.*, 332 F.2d 47 (2d Cir. 1964).

[9] In its brief, Respondent argues vigorously that Balch, Sr., harbored no union animus. Such might be the case with respect to his service and parts employees who had petitioned for an election several years prior thereto, and the record shows that the Company committed no unfair labor practices or wrongful conduct with respect to the election in that case. However, the evidence shows that Balch, Sr., viewed the situation differently with respect to salesmen. As he wrote to the salesmen on August 11, 1979, it was Balch's view that: "In business where Salesmen are organized productivity goes down, which means that each Salesman sells fewer cars. Here at Balch that could be the straw that breaks the camel's back. . . . Salesmen's Unions in car dealerships don't work." (G.C. Exh. 2.)

[10] The eight were, as listed in the complaint: Gerald Allen, Jesse Ansel, Hannah Dresser, Thomas Druzdis, Donald Fitzgerald, Michael Kennedy, Lloyd Moraven, and Peter Peterson.

Balch, Sr., testified that when he took over the control of the dealership from his son in April 1979, the dealership was in dire financial straits, and Balch, Sr., almost immediately made the determination to reorganize the dealership so as to regain its profitability. In so doing, he testified that he sought the help of a Mr. Gray and a Mr. Murray, who were representatives of General Motors Corporation, both of whom testified in the instant proceedings. Gray testified that for the number of automobiles (new and used) sold per month, Respondent's fixed and variable expenses were considerably "out of line." In a letter to the Respondent dated March 30, 1979, Gray pointed out to the Respondent's officials its total variable expense—which included salesman compensation—was "well above average"; that Respondent's total personnel count was considerably above average for the amount of new cars sold; that the mount spent by Respondent to recondition used cards was too high by $50 per unit; that Respondent's interest expense was the highest in the zone; and that the parts inventory was also very much out of line. Gray ended the letter by suggesting that if Respondent "reduce[d] employees [Respondent] will automatically reduce break-even." Nevertheless, in his testimony, Gray emphasized that salesmen's commissions were not an overhead expense (such as the wages of service and parts employees) but were variable expenses which do not come about "unless you sell something."

Chauncey Murray, who worked in the same office with Gray, testified that the primary causes of Respondent's economic difficulties were "lack of sales and organization"; that it was his opinion that Respondent "had some good sales people there and they had some poor, and it was a matter of reorganizing and getting the better of the people."

Balch, Sr., testified that he was aware in May 1979, that the sales force was attempting to organize a union; that he started thinking at that time about laying off some of the sales force as a part of his decision to reorganize the dealership; that he called a meeting of employees in May for the purpose of attempting to ascertain the problems of the employees and to resolve them; however, he acknowledged that he did not mention any layoff of the sales force in the May meeting.

Balch, Sr., testified that the final decision respecting the layoff of the salesmen was made approximately 2 or 3 weeks before the NLRB election and this was memorialized by a statement which Balch, Sr., and General Manager Pinto made before a notary public dated August 13, 1979. Such statement recited that the above-named eight salesmen were to be "temporarily laid off for lack of work"; that such layoff was based on seniority of employment and that two sales personnel (James Dimeo and Walter Martin) were to be retained on the basis of seniority.

The record reflects that during the late spring and summer of 1979, the Respondent either laid off or did not replace employees in the service and parts departments of the dealership so as to assist in reducing the fixed overhead expenses of the Respondent in the face of the reduced sales and mounting expenses which the Respondent was experiencing at the time. The record further reflects that Respondent did not hire or replace the laid-off salesmen until approximately February 1980, at which time one of the two salesmen retained by the Respondent left the Respondent's employment. At that time, Respondent commenced recalling the laid-off salesmen in order of seniority. It is undisputed, with two exceptions, that, thereafter, the Respondent offered to return all of the laid-off salesmen to their former positions. The two exceptions were: (1) Hannah Dresser, whom the Respondent could not locate; and (2) Michael Kennedy, whom the Respondent contended was offered his job back as were the other salesmen. However, Kennedy's testimony on this point is somewhat ambiguous, as follows:

> Q. Okay. Were you offered your job back?
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> A. I really don't know.
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> Q. You don't know if you were offered your job back.
>
> A. I think I was.
>
> Q. You think you were?
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> * * * * *
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> Q. (By Mr. Fitzgerald, resuming) All right. So you don't know whether—you think you were offered your job back?
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> A. Well, I had a conversation with Mr. Balch and Mr. Pinto. And Jesse was there and the secretary, I guess. He called me in one day and he wanted to talk to me.
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> Q. When was one day?
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> * * * * *
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> Q. (By Mr. Fitzgerald, resuming) Okay.
>
> A. As I was saying, I'm not sure exactly what day it was.
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> Q. Well, can you give us a month?
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> A. Oh, it was just—say, eight weeks ago, six or eight weeks ago.
>
> Q. Okay.
>
> A. Somewhere in that area. He called me in and he explained to me how cars are being sold on the West Coast and on the East Coast and what was happening out on the West Coast and everything that happens on the West Coast—it's always—later on it comes to the East Coast. And then he started telling me about how much money I could make and how much money did I want to make. And he was going to start a new system with me working with a woman and we'd work together. Or get one pay or something. I wasn't really sure. I had the—I was working at the time. I was really pressed for time. You know—I got there about nine and I had to be at work at twelve. So when I left I really didn't know. He said he'd get back to me, I guess. I had to go. I came back on a couple times after that

to find out if I was going to get my job back or what was going on. And I never got an answer.[11]

Analysis and Concluding Findings

In a recent case,[12] the Board set forth the following causation test for resolving "all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation." The Board stated that it would "require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct."[13] Applying the foregoing test to the facts in the case at bar, I am convinced, and therefore find, the General Counsel made a *prima facie* showing of discrimination under Section 8(a)(3) of the Act, and that the Employer failed to satisfy its burden of showing that the layoff of the salesmen on August 15 would have occurred even in the absence of the protected conduct.

Thus, the General Counsel's evidence shows that in late spring and summer of 1979, the salesmen of the Respondent engaged in activities protected by Section 7 of the Act; that the Respondent was strongly opposed to such conduct on the part of the salesmen, as shown by threats of its agents as well as the letter of its president to the salesmen shortly before the NLRB election; and that the alleged discrimination occurred immediately following the engagement by the salesmen in the protected activity. The defense of the Respondent rests solely upon its contention that the layoff was a sole consequence of its dire financial condition at the time, and not because of any protected activities by the salesmen.

There can be little question that the Respondent established by substantial evidence the fact that, during the critical period, due principally to poor management practices plus outside factors beyond the Respondent's control, the Respondent was, indeed, in financial straits which necessitated retrenchment activities on its part. The record shows that the Respondent, during the critical period, did, in fact, take measures to cut down on its expenses, such as interest charges, advertising, etc., including layoffs or failure to fill jobs of employees who had been discharged or quit in other departments. However, the critical question, in my view, is whether the Respondent would have laid off 80 percent of its salesmen had they not engaged in protected activities. For the following reasons, I find that the Respondent did not sustain its burden on this issue:

In the first place, the layoff of the salesmen represented a departure from the past practices of the Respondent. That is to say, the record is unrefuted that, in the past, salesmen had been laid off only for their production deficiencies and not because of any financial losses by the Respondent. To be sure, Respondent argues that, in the past, it had never been in such dire financial straits as it found itself during the critical period herein. Nevertheless, the Respondent had been in business over 40 years and one might expect that over such a period of time, the dealership would have undergone periods of prosperity and depression. Yet, it presented no evidence to refute the General Counsel's. This leads us to explore the probable reasons for the Respondent's failure in the past to lay off salesmen during the time of financial losses. Such reasons would appear to be based primarily on the differences in nature of the employment of salesmen as distinguished from employees in other departments. That is to say, the wages and salaries of these other employees are primarily hourly and represent a fixed cost, which, for accounting purposes, are included in the fixed overhead of the Respondent. On the other hand, the salesmen are paid primarily by a commission based on number of sales, and they are paid only a minimum wage for those weeks when their commissions do not total the minimum wage. It is this reason that salemen's commissions are not included as an overhead expense but are considered variable expenses for accounting purposes.[14]

It is for the foregoing reasons that Respondent's advisors, including the General Motors representatives and its accountants, made no suggestion or recommendation that salesmen be laid off—certainly not in the number reflected by the record. Thus, it may be said that the Respondent's action in laying off the salesmen was at least not consonant with past practices or pursuant to any recommendations by its suppliers, bankers, or other advisors. Indeed, it would seem that when one considers the primary purpose of an automobile agency, i.e., to sell automobiles, the layoff of 80 percent of its sales force is not consonant with the act of a prudent businessman which Balch, Sr., appeared to be.

Moreover, Respondent's method of choosing the salesmen to be laid off, i.e., by seniority rather than competency and efficiency, was contrary to the recommendation of a General Motors' representative who suggested to the Respondent that "they should investigate the sales people . . . and reorganize and keep the better of the sales people.[15] General Manager Pinto's testimony to the effect that the foregoing suggestion was not feasible, is not convincing. Certainly, the general manager, in conjunction with his lower level supervisors, has a pretty accurate judgment as to the competency and productivity of the salesmen.

For all of the foregoing reasons, I conclude, and therefore find, that the layoffs of the salesmen on August 15, 1979, was discriminatory in violation of Section 8(a)(3) of the Act, and I will recommend an appropriate remedy.[16]

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[11] In view of the foregoing, it is recommended that the issue of the reemployment and backpay due Kennedy be deferred to the compliance stage of this proceeding.

[12] *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1023 (1980).

[13] 251 NLRB at 1089.

[14] See testimony of Respondent's witness James Gray, a representative of General Motors Corporation.

[15] Testimony of Chauncey Murray.

[16] I have considered the possibility that the financial circumstances of the Respondent at the time may have required, contrary to past practice, the layoffs of *some* of its low-producing salesmen. However, as I understand the Board's opinion in *Wright Line, supra*, this position, if established, would not affect a finding of discrimination based on the foregoing factors. As the Board set forth in fn. 14 of that decision:

Continued

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By unlawfully terminating the eight employees named above on August 15, 1979, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. By the conduct set forth in paragraph 3, above, and by unlawfully threatening and interrogating its employees concerning their union activities, as set forth above, the Respondent has interfered with, restrained, and coerced employees in the exercise of rights protected by Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

It having been found that the Respondent unlawfully laid off the eight employees named hereinabove on August 15, 1979, in violation of Section 8(a)(3) and (1) of the Act, it is recommended that the Respondent, to the extent that it has not already done so, offer the said employees immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the Respondent's unlawful acts, by payment to them of a sum of money equal to the amount they would have earned from the date of their unlawful layoffs to the date of an offer of reinstatement, less net earnings during such period, with interest thereon, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[17]

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[18]

The Respondent Balch Pontiac Buick, Inc., Warehouse Point, Connecticut, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in United Food and Commercial Workers, Local No. 919, AFL-CIO, or any other labor organization, by laying off or otherwise discriminating against employees because of their union membership or activities.

(b) Coercively interrogating employees concerning thier union membership or activities.

(c) Threatening employees with closure of Respondent's automobile dealership, or with other reprisals, should they join or assist the above-named Union or select it as their collective-bargaining representative.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist the above-named labor organization, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) To the extent that it has not already done so, offer Gerald Allen, Jesse Ansel, Hannah Dresser, Thomas Druzdis, Donald Fitzgerald, Michael Kennedy, Lloyd Moraven, and Peter Peterson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make each whole for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the section of this Decision entitled, "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all records necessary and relevant to analyze and compute the amount of backpay due under this recommended Order.

(c) Post at its Warehouse Point, Connecticut, facility copies of the attached notice marked "Appendix."[19] Copies of said notice, on forms provided by the Officer-in-Charge for Subregion 39, after being duly signed by Company's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous

. . . where, after all the evidence has been submitted, the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that "cause" was the straw that broke the camel's back or a bullet between the eyes, if it was enough to determine events, it is enough to come within the proscription of the Act.

[17] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[18] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[19] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the said Officer-in-Charge, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.